Jackson Year in Review 2018

D. Chalgian

Introduction

Most of the exhibits are from plantobe100.com posts, and you will have to go to the blogsite to click to the links if you want those.

I. Legislation

Physician's Order for Scope of Treatment

This is a form that a patient and doctor create at the outset of a medical treatment process, for a specific condition, which indicates preferences with respect to care including end of life care. It is not a patient advocate designation, can co-exist with a patient advocate designation, at times will trump the patient advocate designation's authority. This is not something that a lawyer would prepare. While it is new to Michigan, it is not new to Jackson County.

See: POST Set to Join Michigan's Medical Directive Stew, page 4

II. Cases

A. Published

Brody I: Seems to say that a beneficiary can sue the Trustee of a revocable trust even while the settlor is capable of revoking that beneficiary's interest. Leave to Appeal has been requested, and Probate Section has been authorized to file an Amicus Brief.

See: Remainder Beneficiary of Revocable Trust has Standing to Sue Trustee for Breach, page 6

Brody II: Says, among other things, that the statutory priorities for appointment of a conservator are really just guidelines for the trial court to consider in the exercise of it's discretionary power regarding such appointments.

See: Another Brody Bombshell, page 8

Redd: Traditional application of priorities of appointment for guardian, including a look at the impact of isolation of vulnerable adults from family as a consideration in assessing suitability.

See: Seeing Redd, page 10

Estate Recovery: Says Medicaid Estate Recovery law as applied by DHHS is ok with them + DHHS is correct that it can go back to 2010 to assert lien even if that was prior to the time the Medicaid recipient received notice.

See: MSC takes shot at estate recovery, page 11

Hegadorn: Says DHHS correctly treated assets in Solely for the Benefit Trust as available resources. On appeal to MSC.

See: Bloody Thursday, page 12

B. Unpublished

Bacon: Says DHHS decision to apply hardship exception to avoid house of modest value exception, unless other impoverishment rules are met, is ok with them.

See: Bloody Thursday, page 12

House not titled in Trust: Home owned by Trust did not let the insurance company know that the owner was dead, and therefore, no coverage when family member sues Trustee for injuries sustained while cleaning out the house.

See: Practice Alert: Homeowner's Coverage Doesn't Extend to Trust, page 13

Lost Will: Shows that no matter what type of testimony you produce, if you don't have a copy of the will, you probably aren't going to win.

See: Lost Wills - A Tough Row to Hoe, page 14

Lay Witness: Says you don't have to be a doctor to testify about someone's apparent cognitive impairments.

See: Lay Witness Testimony Regarding Cognitive Impairment, page 15

Share and Share Alike: Reminds us that there are better ways to express ourselves in estate planning documents.

See: Share and Share Alike, page 17

Civil Action v Probate Proceeding: A good refresher on when to file a civil action versus when to file a probate proceeding.

See: Civil Actions versus Proceedings in Probate Court, page 18

III. Watch List

A. The Brody Cases

As Mentioned, leave to appeal has been requested for both Brody I and II; and the probate section of the state bar has filed amicus briefs.

B. SBO Trust Revival

Meanwhile the elder law section has filed an amicus in Hegadorn (the case that killed the SBO Trust). But the MSC leaves the door open to less promising outcomes.

See: SBO Believers Hear Heartbeat, page 20

C. Family Visitation Law

Does Michigan guardianship law need to be modified to specifically address the problems that arise when family members and others are excluded from visiting vulnerable adults? Casey Kasem's children think so – and in today's political environment, that may be good enough.

D. Abandoned by my Spouse

When is has a spouse abandoned their partner sufficiently to waive their elective share and allowances? The MSC has heard arguments on this issue and will be issuing a decision.

See: In Re Estate of James Erwin, Sr. Exhibit A.

POST Set to Join Michigan's Medical Directive Stew

When it comes to medical care advance directives, we Michiganders have patient advocate designations, advance directives, and do not resuscitate orders. Soon, it appears, we will also have POST forms. Laws requiring the development of, and allowing for the use of, POST (or Physician's Order for Scope of Treatment) forms in Michigan have now been passed by both houses and are awaiting the anticipated signature of Governor Snyder. **UPDATE: The Governor has approved these bills. The law has an effective date of February 6, 2018.**

A POST form is a document that would be signed by a patient and their doctor which would provide direction for the treatment of a specific condition, which direction could include end-of-life choices. The expressions in the form would continue to have effect even if the patient subsequently becomes unable to make their own medical decisions.

A POST form differs significantly from a patient advocate designation or advance directive in that a person may not unilaterally create them. They are created by the patient in consultation with their medical care provider.

Waiting for It. Once these new bills are signed into law, State agencies will initiate a process to develop a standardized form. The use of POST forms will be delayed until that process is complete. This process could take years.

Let's look at the soon-to-be new law:

- A guardian and a patient advocate will have authority to create a POST form for a person who is unable to make their own healthcare choices.
- A POST form remains revocable by the patient or their representative (PAD or Guardian). A patient may revoke a POST form orally or in writing.
- If a patient has a pre-existing patient advocate designation that includes an advance directive regarding end-of-life care that is inconsistent with the expression in a POST form, the POST form will take precedence, being treated as a more current expression. Likewise, to the extent inconsistent, a POST form would trump a previously executed do-not-resuscitate order.
- A POST form expires in one year from the date of creation, or sooner if there is an "unexpected change" in the patient's medical condition, if the patient moves to a new facility or to a new care level, and if the patient gets a new attending health professional. They may be continued beyond one year upon agreement of the patient or their representative (PAD or Guardian) and the attending medical provider.
- POST forms would be controlling in institutional care settings, including adult foster care homes; and in the case of an EMS event, outside of institutional care.
- The probate court has jurisdiction to determine the validity of a POST form. The basis for challenging a POST form would be that the POST form expressions are contrary to the patient's wishes or best interests.

To read the law, you will want to look at the four House Bills that make up the package of legislation. Most of the law is in House Bill 4070. Additional changes are in House Bills 4171, 4173 and 4174. Click on the numbers to read the bills. What you will see is that the law is mainly in the public health code, with a few conforming changes to EPIC and the Adult Foster Care Licensing Act.

POST forms have been used in some parts of Michigan (without legal authority) for many years. For the record, Jackson County seems to have been the first to implement their usage some 15 years ago. Other counties have used them for the past few years as part of a pilot program.

POST forms, sometimes referred to as POLST forms (Physician's Order of Life Sustaining Treatment), are currently in use in several other states. For a good discussion of POST/POLST forms, go to the National POLST Paradigm website by clicking on the name.

Remainder Beneficiary of Revocable Trust

has Standing to Sue Trustee for Breach

September 14, 2017September 14, 2017 Cases, Cases, Statutes and Court Rules, Fiduciaries, Litigation and Financial Exploitation, probate court jurisdiction Edit

Several issues are addressed in this published opinion regarding a family trust contest that occurs while Mom, settlor, is living. Mom's trust is revocable and Dad is Trustee. Mom may or may not be competent at the time of the litigation, hence the Trust may or may not have become irrevocable.

To read In Re Rhea Brody Living Trust click here.

The most interesting issue addressed in the opinion is whether Daughter, a residual beneficiary of a trust that remains revocable, has standing to contest the administrative actions of the Trustee. Mom's Trust provides for both son and daughter to receive equal shares upon the death of survivor of herself and Dad. Daughter says the sale, by Dad/Trustee, of certain business interests to Son and his children is a breach of his fiduciary duty to her and violates the requirement that he appoint an independent co-Trustee to engage in any action that alters the interests of beneficiaries. The COA says Daughter, as reidual beneficiary, has standing as an "interested person" under EPIC pursuant to MCL 7.7201 to contest Trustee/Dad's actions as Trustee which would ultimately affect her interest if the Trust if it is not subsequently amended to remove her. It rejects the contention that standing is controlled by the "real party in interest" rule set forth in MCR 2.201(c). The COA holds that this would be true regardless of whether Mom is or isn't competent (that is, regardless of whether trust has or has not become irrevocable). This is an important clarification of the law, and would presumably mean that Daughter could have sued Mom/Settlor for doing the same thing if Mom were acting as her own Trustee. (Of course, if that were the case, Mom could simply amend the Trust and make the issue moot.)

Further complicating the analysis is the fact that the Trust provides that if Dad survives Mom, Dad as Trustee may make unequal distributions to the two children. Accordingly Dad and Son argue that this means no harm was done to Daughter even if the sale reduced her expectancy interest in the Trust. The COA however notes that Dad has not survived Mom and therefore those provisions are not in play. The COA goes further (perhaps dicta), to conclude that notwithstanding the unequal distribution provisions, the overall intent of the Trust is equal division between children and therefore the actions of Trustee/Dad could be a breach. The trial court in fact found his actions to be a breach and ruled in favor of daughter on summary disposition.

The COA also provides an interesting analysis of the remedies directed by the trial court regarding two sales that were the basis of the litigation. The trial court ordered reformation of the contract on one sale and rescinded the other. The COA found that while rescission was an appropriate remedy, reformation was not. In remanding the reformation portion of the trial court's order, the COA offers an important explanation of the limitations of a court's equitable powers.

Finally, and least importantly (although this is the first issue addressed in the opinion), this case looks at subject matter jurisdiction of business courts in relation to probate courts. Dad/Trustee argued that the litigation discussed above was improperly filed in probate court because all business litigation is required to be brought in the "business court." The COA finds that there is a conflict between the statutes controlling business court and probate court subject matter jurisdiction, but concludes that the probate court does not lose subject matter jurisdiction over trust cases simply because the litigation involves issues related to business interests. The COA notes that this confusion is temporary for the reason that the business court jurisdiction statute was recently amended to further limit the jurisdiction of business courts to cases in which a business entity is a party. That change becomes effective October 11 2017.

Another Brody Bombshell

This is a published Court of Appeals opinion involving the appointment of a conservator over an adult under EPIC. Click here to read In Re Conservatorship of Rhea Brody.

This case comes out of same family that was involved in the In Re Rhea Brody Living Trust, which case is the topic of the post earlier this month. That prior case dealt with the Rhea Brody Trust, and offered the surprising revelation that a contingent beneficiary of a Trust could contest the actions of the Trustee even while the trust remained revocable. Click here to read that post. This second Brody case deals with the appointment of a conservator for Ms. Brody.

The litigants in the case are aligned similarly. In the Trust matter, husband and son were aligned in defending the removal of husband as Trustee, which arose as a result of favorable business dealings between the husband as trustee and the son; which dealings were perceived as being done to the detriment of the daughter, a contingent beneficiary. In this case, husband and son oppose appointment of a conservator, which appointment is supported by daughter. The court appointed an attorney who was also acting as Trustee of Rhea's Trust to serve as her conservator. The COA affirms.

The husband, as appellant, contests pretty much every aspect of the trial court's decision, except the finding that Rhea was incompetent. The conclusions of the COA are intriguing. Look for this case to be cited often by litigators seeking to impose conservators and desiring to by-pass priorities of appointment. To some extent, perhaps a large extent, this case is the counter balance to In Re Bittner, a relatively recent published opinion addressed in the post "Bittner's Bite" (click on name to read that post). In Bittner, the COA chastised a trial judge for imposing a conservator where the requirements of EPIC were not met. Here, the COA goes to great lengths to justify the appointment over seemingly problematic facts.

One issue relates to whether the evidence supported the finding that appointment of a conservator was necessary to provide for management of assets and avoid waste. In this case the evidence is that husband was agent under a valid POA for Rhea, and further, that all of her assets (except one IRA) were joint with husband. Further, husband alleges that the IRA was set up to make minimum required distributions annually. The basis for finding necessity appears to be the conclusion that husband wasn't really managing these matters, but rather that he had "abdicated" his role to the son, and that son was a potentially devious manipulator of the situation. The COA goes so far as to suggest that the appointment of a conservator was necessary so that someone independent could review the tax returns.

Which leads to another conclusion of law by the COA in this matter: that the appointment of a conservator does not require a finding that there has been waste of assets, only that such waste could occur in the future. So reasonably founded speculation is enough.

Additionally, and perhaps most concerning, are the findings of the COA with respect to the priority of appointment. The COA cites MCL 700.5409(1)(a) for the proposition that

an independent fiduciary has priority over a spouse and agent under a POA where the POA nominates the agent as conservator. MCL 700.5409(1)(a) says:

(1) The court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in section 5106 to serve as conservator of a protected individual's estate. The following are entitled to consideration for appointment in the following order of priority:

(a) A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides.

I have always understood this section to mean that a conservator previously appointed by another court would have priority. In this case, the COA seems to say that a professional fiduciary appointed as Trustee over the ward's Trust by this same Court meets that definition. The COA states:

Under MCL 700.5409, a protected individual's spouse is entitled to consideration for appointment as conservator, and is granted priority over all other individuals except "[a] conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides," MCL 700.5409(1)(a), and "[a]n individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney," MCL 700.5409(1)(b). As Rhea's husband, Robert was an individual entitled to priority consideration. However, Robert was not entitled to consideration unless the probate court considered an independent fiduciary and found him or her unsuitable. Lyneis, as trustee and independent fiduciary, had statutory priority over Robert, despite Robert's marriage to Rhea. MCL 700.5409(1).

Wait – WHAT? Where is the other jurisdiction?

Further, and maybe even more unsettling, the COA says:

The statute's priority classifications are merely a guide for the probate court's exercise of discretion.

Really? This statement seems to fly in the face of a long line of cases that require a finding of unsuitability – including, perhaps ironically, the case of *In re* Guardianship of Dorothy Redd, which is the topic of the other post I wrote today, a case issued by a separate panel of the COA on the same date as this matter.

That said, the COA goes on to say that the husband is unsuitable, again, because the son is a manipulative fellow and may use his influence over husband to Rhea's detriment in the future.

There are other issues addressed in this case, but I think I've hit the ones that seem most significant, and that are those most likely to be cited by litigators in the future.

Seeing Redd

Here's another important published opinion on the topic of adult guardianships. The case is about the removal of a guardian of an adult ward appointed under EPIC.

The case deals with the very common, and therefore very important, situation in which a guardian is using its position to undermine healthy family relations. In this case, the facts relied upon by the trial court and the COA are that the existing guardian was actively interfering with visitations, and taking steps to cause the ward to be distrustful of other family members. These alienation cases go on all the time. It is helpful to have an opinion that clarifies that such behavior is a basis for removal of a fiduciary. It is likely that this case will be cited frequently where such facts arise, and I suspect that the finding that such behavior disqualifies a guardian will be offered by extension to cases involving conservators and other fiduciaries. And that's good. We need this law.

So basically the trial court removed a guardian for the reason that he was undermining family relations, and the COA affirms. Click here to read *In re* Guardianship of Dorothy Redd.

In reaching its decision, the COA holds that the standard for removal is "suitable and willing to serve." This finding is an important clarification of MCL 700.5310 which is silent on the requirement for removal.

The COA also finds that the standard of proof for removing a guardian for unsuitability is not clear and convincing evidence, but rather a preponderance. Interestingly, in reaching this conclusion the COA indicates that the standard for proving unsuitability in the initial appointment hearing is clear and convincing evidence. This reading of the priorities in a guardianship proceedings seems inconsistent with the conclusions regarding priorities and unsuitability reached by a separate panel discussing these issues in the context of a conservatorship, as addressed in my other post of today's date regarding In Re Conservatorship of Rhea Brody.

So, it's a big day in the world of litigating guardianships and conservatorships. These two published cases (Brody II and Redd) will be cited in the future, each for their own important conclusions of law. Probate litigation in the age of living to be 100, where the fun never ends.

MSC Takes Its Shot at Estate Recovery

August 1, 2017 appeals Michigan Court of Appeals, Asset Protection, Cases, Statutes and Court Rules, Estate Recovery, Government Benefits, Medicaid Edit

The Michigan Supreme Court has released an opinion in four combined cases all involving Michigan's Medicaid Estate Recovery Program. As we've learned from prior posts, the Michigan Court of Appeals has not been a friendly environment for Medicaid long term care planning (see for instance the "Bloody Thursday" from just a few weeks ago). Well it turns out the Supremes are even less welcoming.

In their opinion the Michigan Supreme Court concludes the Court of Appeals was too generous in calculating the start date for estate recovery. They hold DHHS can go back to July. 2010. The Supremes reject all constitutional arguments or considerations, and address the "house of modest value" issue by vacating those portions of the Appeal's Courts decisions that discuss it.

Click here to read In Re Rasmer Estate, Gorney Estate, French Estate and Kethcum Estate.

Appreciation for all who have worked so hard on this issue. It appears however that the time has come to let it go.

Bloody Thursday

June 1 2017 was a bad day for Medicaid planners who pinned their hopes on the Court of Appeals to reverse a string of losses. The Court issued three opinions, all unpublished. Two of them are substantive losses; the third a pyrrhic victory.

In the combined cases of Hegadorn v DHHS (click here to read the case), the COA held that DHHS is correct that assets placed in a "Solely for the Benefit" Trust are countable resources for determining eligibility of a married couple; and by doing so put a final nail in the coffin of the once beloved planning tool. Ah the good old days. Note: the Hegadorn case was subsequently approved for publication.

In Estate of Calvin Bacon (click here to read the case), the COA upheld the bizarre manner in which DHHS used policy to undermine the value of the statutory hardship exception to estate recovery. Click here to read the concurring opinion which suggests a panel to resolve a perceived conflict with this outcome and the outcome in Ketchum.

In Estate of Marian Cary (click on name to read the case) the Court upheld a trial court's decision that it was ok to spend $46,000 on legal fees fighting with DHHS over an estate recovery claim that the estate disallowed. The COA notes that at the time the issue was litigated, estate recovery cases were new and the COA had not issued its controlling decisions. That means, while it was ok at that time, it would not be ok now. There was a dissent which said the trial court did not create an adequate record. Click here to read the dissent.

Practice Alert: Homeowner's Coverage Doesn't Extend to Trust

April 14, 2018April 14, 2018 Cases, Cases, Statutes and Court Rules Edit

Floyd lived in a house owned by Floyd's revocable trust. But the homeowner's insurance policy was issued to Floyd individually. After Floyd died, a family member was in the house removing personal property and was injured. That injured person sued the Trust and was awarded $100,000. Trustee submitted the award to the insurance company for payment, and the insurance company denied coverage, saying that no one told them that Floyd had died, and their policy was with Floyd, not the Trust.

The trial court noted that the insurance company had collected premiums for the period at issue, and said they were estopped from denying coverage. The Court of Appeals reversed, arriving at the conclusion:

The Trust was not an insured under a policy issued by Fremont. Fremont therefore was not obligated to provide coverage to the Trust for plaintiffs' judgment and Fremont was entitled to summary disposition of plaintiffs' claims.

With respect to the insurance premiums which were collected for the period after Floyd's death, the COA seems to say that to the extent the acceptance of premiums created any contractual obligations, it would have been a contract with the estate, but the estate is not the trust.

To read Thompson v Fremont Insurance Co., click on the name. The case is unpublished.

The result seems harsh, but assuming it accurately states the law, this case serves as a warning that clients (and perhaps lawyers) need to let the homeowner's insurance company know when they have placed their house in trust. Something to add to the checklist perhaps.

Lost Wills – A Tough Row to Hoe

This juicy little soap opera out of Battle Creek starts where so many of such tales begin: Dad is married but his children are from a prior relationship. Then Dad dies. Daughter Brooke actually goes through the pockets of the dead man looking for the keys to the gun safe where he kept his will – but too late!

The Court of Appeals describes the scene as follows:

Brooke Barksdale noted that when she arrived at the decedent's home at approximately 11 a.m. on the day of the decedent's death, petitioner's son, Shawn, tried to stop her as Brooke Barksdale went to see the decedent's body, and when she looked in the decedent's pants pocket for his car keys, which also contained the keys to the gun safe, she could not find them.

And, upon further investigation, she sees that the door to the gun safe (which he always kept locked) stands open. Before she can further investigate, Wife tells her to leave. Classic!

Wife petitions to open an estate intestate. Kids counter with petition to admit a lost will. Wife brings motion for summary disposition. Kids submit affidavits of themselves and others that aver that Dad had a will he kept in the gun safe. It named Brooke as Personal Representative. The house went to Brian and the rest was distributed among his kids and grandkids in unknown proportions. They aver that Dad discussed the will with them on numerous occasions, that he kept it locked in his gun safe, and that he had it out when he had Brooke sign various other legal documents related to his affairs. They further aver that Wife was present during some of these conversations and that she verbally acknowledged the will's existence on at least one occasion.

Trial Court grants summary disposition to Wife, saying that the proffered testimony is insufficient to withstand summary disposition because there is no evidence that the will was executed in conformity with the requirements of a valid will or holographic will under MCL 700.2502, or that it could be admitted as document intended to be a will under MCL 700.2503; and further that the terms remain too sketchy even with the recitations of the kids to meet their burden. MCL 700.3402, MCL 700.3407. Court of Appeals affirms.

The case is unpublished, so take it for what it's worth. And I think that what it is worth is that it sheds light on the challenges of probating a lost will when no copy can be found.

Takeaways from this case:

1. Admitting a lost will when there is no draft or copy to be found is a tough row to hoe.
2. It's a good idea to keep your will someplace where people who might want to destroy it can't do so after you die or become incompetent.

Read In Re Estate of Stuart Alister Warner by clicking on the name.

Lay Witness Testimony Regarding Cognitive Impairment

In the recently unpublished Court of Appeals case of Rebecca L. Clemence Revocable Trust (click on name to read the case), the trial judge essentially granted summary disposition in a trust contest case, without summary disposition even having been requested. In doing so, the trial judge expressed frustration that the matter had continued for so long and that, in the judge's opinion, inadequate evidence of wrongdoing had been discovered.

The Court of Appeals reversed and remanded.

What I find helpful about the case is the COA's discussion of lay witness testimony as evidence regarding incapacity. We have discussed before the growing inclination of court's to look for medical evidence as the last word on incapacity and vulnerability. One of the challenges of handling capacity and undue influence cases is that very few people happened to have medical evaluations done contemporaneously with the event in question.

The portion of this case which I will keep in my notes, provides authority for the proposition that the observations of lay witnesses are admissible evidence of incapacity and, if sufficient, can preclude summary disposition. Specifically, this portion of the opinion is on point:

Certainly it would be easier to prove whether Rebecca possessed testamentary capacity or was vulnerable to undue influence if the probate court could review medical records contemporaneous with her estate plan amendment. But such records are not the only method of proof. A lay witness may place his or her opinions into evidence as long as they "are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. And our Supreme Court has specifically found lay opinion testimony admissible to establish a decedent's testamentary capacity. See *In re Moxon's Estate*, 234 Mich 170, 173-173; 207 NW 924 (1926) (holding that a lay witness "who [has] had the opportunity to observe and talk to [the decedent]" may form "impressions" of the decedent's testamentary capacity and may cite examples for the factfinder's consideration);

Proving that an older person suffered from cognitive impairments at that time they executed a document being contested is central to nearly every will and trust contest or case of financial exploitation. Lack of Capacity and Undue Influence remain the most common theories of probate and elder law litigation. These are often fact-rich cases and discovery is frequently extensive. Trial judges may have limited patience and are under pressure to close cases expeditiously. Many trial judges also have a strong inclination to require medical evidence in cases where cognitive impairment is a factor, but such evidence is not always available. As a result, introducing lay testimony to establish cognitive decline is necessary, and often the best evidence available. In those cases, it is not unusual when presenting such lay witnesses, for the opposing counsel to assert that the lay witness has no medical training and therefore their testimony should not be allowed. This case supports the proposition that such objections should not

prevail. Lay people can observe behavior in older adults that suggests impairment, and those observations can be admitted and relied upon by a fact-finder.

Share and Share Alike

This is an unpublished will construction case. To read In Re Estate of Eugenie Dietrich, click on the name.

In other posts (see for instance Who Gets the Grow Lamps?) we've seen the problems that arise when attorneys fail to use the precise legal terms of art. In this case, we see the problems that arise when lawyers toss in archaic legal language.

The will says: "To Peter Dietrich and Johann Dietrich, my sons, to be divided between them in equal shares, share and share alike."

Turns out Johann predeceased Eugenie. So Peter says: "it's all mine." Johann's issue took exception. The trial court agreed with Johann's children, and ordered that they would take their deceased father's share. The Court of Appeals affirmed.

Michigan law strongly favors construction of estate planning instruments that vests the interests of predeceasing family members in their descendants. That's what our "anti-lapse" rules are for. See MCL 700.2603. Those anti-lapse rules however can be rebutted with sufficient evidence of a contrary intent. This case offers a discussion of class gifts versus individual gifts and the rules of construction that apply, with specific focus on the meaning of the term "share and share alike." A good read perhaps for younger lawyers developing their drafting style.

As for the phrase "share and share alike," I think the lesson is: don't use it. I've seen it many times but have never understood why it would be used when there are better ways of expressing a client's intentions regarding what is to be done with property if a devisee predeceases.

Perhaps the attraction is that it sounds so fine – so high minded – "share and share alike." Almost like a blessing- "go forth and prosper," "live and let live," "do unto others." It has that kind of musical or poetic quality. But our goal in drafting estate planning documents is not to be poetic, rather to be clear.

Civil Actions versus Proceedings in Probate Court

August 10, 2017 appeals Michigan Court of Appeals, Cases, Cases, Statutes and Court Rules, Court Rules, EPIC, Fiduciaries, Litigation and Financial Exploitation, Protected Persons Edit

When starting a new litigation matter in probate court, a threshold issue is to determine whether the matter should be characterized as a probate "proceeding" or a "civil action." There are significant differences between the two, including what court or courts it can be filed in; and what type of pleading, a petition or a summons and complaint, must be prepared.

Generally, a claim against a third party filed by a Trustee or Conservator would be a civil action; whereas things like surcharging a fiduciary, construing or modifying a trust, or seeking to invalidate a will or trust, would be a proceeding. The primary source distinguishing between the two is MCR 5.101.

This distinction is the issue in a newly released unpublished case from the Court of Appeals. In this case, a seasoned Oakland County public fiduciary, John Yun, was appointed conservator over the estate of a demented person who had apparently been exploited by a Mr. Hartman. The conservator filed a petition for surcharge seeking recovery of assets that Hartman allegedly converted to himself before the conservatorship was created. Mr. Yun followed the requirements of notice for a proceeding by mailing a copy of the petition and notice of hearing to Hartman. Hartman did not show up for the hearing, and the trial court entered an order finding that he was liable for nearly $200,000. Mr. Yun then brought a motion to have the order converted to a judgment. Hartman objected, claiming that the process by which the order against him had been entered was defective as it should have been filed as a civil action and not a proceeding; and accordingly that he should have been served with a summons and complaint and not a petition.

Click here to read In Re Doreen Seklar.

In its opinion, the COA reviews the distinctions between a proceeding and civil action and concludes that the probate court was correct in allowing the order to enter through the proceedings process. In reaching this conclusion the COA relies on the proposition that Hartman was a "fiduciary." In fact, the protected person had created a power of attorney appointing Hartman as her agent, and a revocable trust nominating Hartman as successor Trustee. These documents were all set aside by the probate court in its initial hearing. But what troubles me about the case is that the COA holds that a person nominated as a successor trustee is a fiduciary for purposes of MCR 5.101. It says:

Further, Hartman meets the definition of a fiduciary. First, the March 14, 2014, revocable trust named Hartman a successor trustee.

That seems like a stretch. And while I appreciate expediency, I worry that such rationale could be applied in similar and dissimilar situations with unanticipated outcomes. While in this case, Hartman no doubt was aware of his nomination as a successor Trustee,

apparently having had a large role in obtaining the estate planning documents, people are frequently nominated to such roles without ever being advised. It seems potentially problematic to me to have a case that holds that a person who never accepted or acted in a nominated fiduciary role is a fiduciary for the purposes of being subject to a probate proceeding.

I am certainly not challenging Mr. Yun's approach. He is highly experienced in this type of work, and he got the job done and did so very efficiently. However, another approach to this case could have been to have the probate court order Hartman to account, and/or to simply have sued Hartman for conversion, fraud and other civil causes of action by filing a summons and complaint.

In any event this case highlights an issue that comes up regularly in probate litigation matters. For those interested in the topic, it's worth a read.

SBO Believers Hear Heartbeat

March 13, 2018March 13, 2018 appeals Michigan Court of Appeals, Government Benefits, Medicaid Edit

In June 2017, I wrote about the combined cases of Hegadorn and Ford under the title Bloody Thursday. As discussed in that post, these combine Court of Appeals cases supported the Michigan Department of Health and Human Services conclusion that resources held in a "solely for the benefit" trust are countable assets for the purposes of determining eligibility for long term care Medicaid benefits. In other words, a long favored Medicaid planning tool was officially dead.

However, since that time the Elder Law and Disability of Rights Section of the State Bar has been working to overturn that decision. On March 7, 2018, the Michigan Supreme Court agreed to hear the case. This is a big first step, but by no means a guarantee that the SBO Trust will be revived. In fact, the Order granting leave to appeal specifically cites two issues on review: (1) whether the COA's conclusion that the assets in an SBO trust are countable resources for Medicaid eligibility purposes is correct; and (2) whether DHHS could retroactively apply the change in policy that resulted in the denial of eligibility in these cases. Note, on this second point, DHHS has argued that they did not change policy but rather only clarified existing policy. To read the MSC Order allowing the appeal, click here.

So, the MSC could (1) affirm the COA decisions completely, (2) hold that the SBO trust is a valid planning tool and return it to use, or (3) say that the policy is fine but that it was applied unjustly in these two instances.

Those who have never accepted the demise of the SBO trust have new hope. The application for leave was written and will continue to be advocated by the pride of Ishpeming, and premier elder law attorney, James Steward. SBO believers could have no better captain at the helm.

Exhibit A

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JAMES ERWIN, SR.

BEATRICE KING, Individually and as Personal Representative for the Estate of JAMES ERWIN, SR.,

Appellant,

v

JACQUELINE E. NASH, BILLY J. ERWIN, DEMARKIUS ERWIN, MAGGIE ERWIN, and STACY ERWIN OAKES,

Appellees.

UNPUBLISHED
May 10, 2016

No. 323387
Saginaw Probate Court
LC No. 13-130558-DE

In re Estate of JAMES ERWIN, SR.

BEATRICE KING,

Appellant,

v

JACQUELINE E. NASH, BILLY J. ERWIN, DEMARKIUS ERWIN, MAGGIE ERWIN, STACY ERWIN OAKES, and DOUGLAS TAYLOR,

Appellees.

No. 329264
Saginaw Probate Court
LC No. 13-130558-DE

Before: HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

James Erwin, Sr. died intestate on October 12, 2012. He was survived by his spouse, Maggie Erwin, and 10 children: six children from his first marriage and four children from his second marriage to Maggie. These consolidated appeals involve a heated dispute over the assets remaining in his estate. The primary issue in Docket No. 323387 concerns whether Maggie, who did not physically live with Erwin, is a surviving spouse for the purposes of the Estates and Protected Individuals Code (EPIC), 700.1101 *et seq.* In Docket No. 329264, King (James's daughter) appeals her removal as personal representative of the estate. Because we conclude that the trial court did not err, we affirm in both appeals.

I. FACTUAL BACKGROUND

James and Maggie were married in 1968. In February 1973, they purchased a house in Saginaw as tenants by the entireties. However, it is undisputed that Maggie and James did not live together after 1976, and in February 1976, Maggie petitioned the Saginaw Circuit Court for support for herself and her four children.

In 2010, James and Maggie jointly sued General Motors for breach of contract. In their complaint, James and Maggie asserted that Maggie was James's spouse, that they were married in 1968 and remained married at the time of the complaint, and that "the life of Maggie Erwin . . . would be irreplaceable for her husband . . . ." Maggie was also the beneficiary of James's life insurance policy.

In June 2013, Beatrice King, James's eldest daughter from his first marriage, petitioned the probate court to appoint her personal representative of Erwin's estate. King stated that some of James's heirs had denied her access to James's house. The probate court accepted King's appointment as personal representative.

After the initial probate court judge disqualified himself from the case, the State Court Administrator's Office assigned the matter to Judge Nancy L. Thane. Attorneys for Nash, King, and Maggie agreed to hold hearings in the Tuscola Probate Court for the convenience of Judge Thane, but venue for the case remained in Saginaw County. The trial court held hearings in Tuscola County. It ultimately determined that, because there were indications that James and Maggie had contact and an ongoing relationship during their separated years, Maggie had not willfully abandoned James for the purposes of MCL 700.2801(2)(e). The trial court specifically relied on statements made during their 2010 lawsuit.

In November 2014, Maggie sought funeral reimbursements from the estate, which the estate denied. Maggie petitioned to remove King as the estate's personal representative. Maggie attached to her petition an affidavit in which Stanley Roberts stated he observed Nash removing coins and a note of indebtedness from a safe in James's residence. Stacey Erwin Oakes, a daughter of James and Maggie's, also filed a brief in support of Maggie's petition. Erwin requested an accounting, which prompted a hostile email exchange between the parties' attorneys. Nash ultimately refused to provide an accounting. The trial court found that it was in the best interests of the estate to have a neutral person acting as personal representative, and it appointed a new personal representative for the estate.

II. SURVIVING SPOUSE

A. STANDARDS OF REVIEW

This Court reviews for clear error a probate court's findings of fact and reviews de novo issues of statutory interpretation. *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011). A finding is clearly erroneous if this Court is definitely and firmly convinced that the trial court made a mistake. *Id.*

When engaging in statutory interpretation, if the plain and ordinary meaning of a statute's language is clear, we will not engage in judicial construction. *In re Kubiskey Estate*, 236 Mich App 443, 449; 600 NW2d 439 (1999). We must enforce unambiguous statutes as written. *Id.* at 448. When interpreting a statute, our goal is to give effect to the intent of the Legislature. *Id.* We construe words and phrases in accordance with their commonly understood meanings. *Townsend*, 293 Mich App at 187.

B. LEGAL BACKGROUND

Article II, part 1 of the EPIC governs rights to an intestate inheritance. *In re Certified Question*, 493 Mich 70, 76-77; 825 NW2d 566 (2012). If a decedent dies intestate and has no surviving spouse, the EPIC provides the order in which the decedent's estate will pass to his or her surviving relatives. MCL 700.2101. The decedent's surviving spouse is entitled to a share of a decedent's intestate estate. MCL 700.2102. But not all spouses are entitled to a share. See MCL 700.2801. For the purposes of intestate succession, a spouse who ceased supporting the decedent spouse before his or her death may not take a share from an intestate estate:

> . . . [A] surviving spouse does not include any of the following:
>
> * * *
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse.
>
> (*ii*) Deserted the decedent spouse.
>
> (*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. [MCL 700.2801(2)(e).]

C. INTERPRETATION

King contends that the trial court erred when it found that Maggie was a surviving spouse entitled to a share of James's estate. King contends that because James and Maggie did not live together, Maggie was "willfully absent from" James by definition. We disagree and conclude that willful absence for the purposes of the EPIC is a factual question that may concern more than physical proximity.

The EPIC does not define willful absence under MCL 700.2801(2)(e)(*i*). Where a statute does not define a specific term, we may consult a dictionary to ascertain the word's common and

ordinary meaning. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When used as a transitive verb (i.e., in the sense of a person being absent from another person, which is the usage in the statute in question), the dictionary defines "absent" as "to keep (oneself) away." *Merriam-Webster's Collegiate Dictionary* (11th ed). In this sense, consulting a dictionary is not particularly helpful. It simply does not answer the manner in which the spouse must keep the other spouse away: whether the distance must be physical, emotional, or some combination thereof.

Fortunately, we have other tools of interpretation at our disposal. When engaging in statutory interpretation, we must read the statute as a whole. *In re Casey Estate*, 306 Mich App 252, 257; 856 NW2d 556 (2014). We read the provisions of statutes in context and read subsections of cohesive statutory provisions together. *Id.*

Reading the willful absence provision in context with the desertion and willful neglect provisions, it is clear that the provisions include some level of intent as well as physical distance. When used as a verb, to "desert" means "to withdraw from or leave usu. without intent to return." *Merriam-Webster's Collegiate Dictionary* (11th ed). To "neglect" means "to give little attention or respect to" or "to leave undone or unattended to esp. through carelessness." *Id.* There is no indication that the Legislature intended any of the terms in this section to apply in cases of sole physical separation.

Case law supports this interpretation. Considering the language of the now-repealed MCL 700.290, which was different from the language of MCL 700.2801 in only minor ways, this Court determined that the similarly worded statute encompassed "emotional as well as physical absence from or desertion of the decedent spouse." *In re Harris Estate*, 151 Mich App 780, 785; 391 NW2d 487 (1986). In that case, this Court reasoned that "[p]hysical presence in the marital home is strong evidence that the party remains involved in the marriage to some degree . . . ." *Id.* at 786. However, the Court also considered the party's intent in ending the marriage, stating that the party seeking to establish the spouse was a non-surviving spouse must show "actions indicating a conscious decision to permanently no longer be involved in the marriage." *Id.* While a party's presence in the marital home is one part of a fact-based analysis, physical presence was not the sole legal consideration. Because the statutory language involved in that case bore only minor distinctions from the language involved in this case, we find this opinion persuasive.

In *Tkachik v Mandeville*, 487 Mich 38, 40-41; 790 NW2d 260 (2010), the Michigan Supreme Court considered a case of equitable contribution in which the husband frequently left the country and was absent for the 18 months before the decedent wife's death. The husband knew that the wife was seriously ill, but did not attempt to call or communicate with her, and he did not attend her funeral. *Id.* at 41. The decedent wife executed a trust and will that disinherited the husband. *Id.* at 42. Although we recognize that the Michigan Supreme Court was not construing MCL 700.2801, it noted that the trial court deemed the husband a non-surviving spouse under MCL 700.2801(2)(e)(*i*). *Id.* at 42-43, 57. The fact-specific inquiry in *Tkachik* supports that spousal relationships are best viewed as factual questions.

For these reasons, we conclude that the trial court should determine whether a spouse is willfully absent from the decedent spouse under MCL 700.2801(2)(e)(*i*) by considering all the

facts and circumstances of the case. A physical separation may provide factual support for a determination that one spouse was willfully absent from another, but it does not necessarily preclude a spouse as a surviving spouse under MCL 700.2801(2)(e)(*i*). A physical separation is only one piece of evidence that the trial court may consider and weigh when determining whether one spouse was willfully absent from another.

We note that this construction avoids several practical concerns. If MCL 700.2801(2)(e)(*i*) precluded inheritance solely on the basis of physical absence, what about spouses whose jobs, pursuit of education, or family situations require them to live for extended periods of time in another part of the country, or in a foreign country? A spouse who moves to a foreign country to assist a parent during his or her declining years? A spouse who must seek medical treatments in a distant state and who, unlike the circumstances presented in *Tkachik*, decide to live apart for convenience or to avoid taking joint children out of school? Under King's proposed interpretation, even if these spouses remained emotionally intimate, the mere fact that they chose not to live in a joint household would legally sever them from inheritance. These scenarios should not be resolved as a purely legal matter, and the language of the statute does not require it.

D. APPLICATION

In this case, it is undisputed that James and Maggie did not live as a single household after 1976. King presented three affidavits supporting that James and Maggie had not cohabitated since 1976.[1] However, their physical separation did not operate to foreclose a continued emotional intimacy. Maggie presented evidence that as late as 2010, more than 30 years after their physical separation, James considered he and Maggie still married and stated that Maggie's life was "irreplaceable."[2] While the record is sparse in this case, the burden was on King to establish that Maggie was not a surviving spouse. See *In re Koehler Estate*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (stating the burden is on the party asserting an exception to establish it). King did not do so. We are not definitely and firmly convinced the trial court made a mistake when it found that Maggie was entitled to inherit as James's surviving spouse.

We also reject King's assertion that the trial court was required to hold an evidentiary hearing in this matter. The trial court may hear a contested motion on the basis of affidavits presented by the parties. MCR 2.119(E)(2). Whether to do so is within the trial court's discretion. See *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995). However,

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[1] These affidavits did not remark on the existence of emotional intimacy, but instead concerned only whether James and Maggie cohabitated.

[2] Even if the court's brief statement that Maggie provided James with care "at some point in time" was a reference to Jacqueline Nash's unsworn statement that James lived with Maggie for a week after he was released from the hospital was improper, any reference was exceedingly brief. It is clear from the trial court's opinion that it primarily based its findings on their joint lawsuit in 2010.

the trial court should hold an evidentiary hearing if the motion requires resolution of credibility issues. *Id*; also see *Kiefer v Kiefer*, 212 Mich App 176, 179-180; 536 NW2d 873 (1995).

In this case, the trial court decided the motion on the basis of the documentary evidence and affidavits the parties attached to their respective motions. Both parties were permitted to submit evidence and respond to the other party's arguments, and both parties did so. Resolution of the issue did not involve credibility determinations. We are not convinced that the trial court's decision to decide the motion on the basis of documentary evidence and affidavits fell outside the range of principled outcomes.

III. ENTIRETIES PROPERTY

King contends that the trial court erred when it found that Maggie should not be required to pay contribution to the estate regarding the property that James and Maggie held as tenants by the entireties. We disagree.

This Court reviews de novo application of an equitable doctrine to a case. *Tkachik*, 487 Mich at 44-45. We review for an abuse of discretion the trial court's ultimate decision whether to grant or deny equitable relief. *Id.* at 45. We review for clear error its findings of fact supporting its determinations. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

Under a tenancy by the entirety, "one tenant . . . has no interest separable from that of the other." *Long v Earle*, 277 Mich 505, 517; 269 NW 577 (1936). Each tenant has a right of survivorship. *Tkachik*, 487 Mich at 46. The doctrine of contribution provides that when one person has borne more than his or her share of a cotenant property, the other tenants may be required to contribute. *Id.* at 47. And the theory of unjust enrichment provides that a person may not retain money or benefits that, through justice or equity, rightfully belong to another. *Id.* at 47-48. Together, these doctrines may provide that a party may be unjustly enriched by acquiring property held as tenants by the entireties if he or she was equitably required to contribute to the upkeep of that property but did not. *Id.* at 49. However, whether contribution is appropriate depends on the facts and circumstances of each case. *Id.* at 57.

In *Tkachik*, the Michigan Supreme Court considered several "special circumstances" when concluding that equity allowed the wife's estate to sue the husband for contribution. *Id.* These circumstances included that the decedent wife had sole financial responsibility for care of the property while there was no contact between the spouses, the wife disinherited the husband from her will, the wife diligently sought the property, and the husband was a non-surviving spouse for the purposes of the EPIC. *Id.* It concluded that applying the doctrine of contribution was permissible under those facts. *Id.*

In this case, James did solely maintain the property. However, there was evidence that James provided Maggie with financial support and no evidence that he sought sole ownership of the property. James also did not seek to disinherit Maggie—to the contrary, he made no will and she remained a named beneficiary on his life insurance policy. There is no evidence that the parties failed to communicate. Finally, the trial court determined that Maggie was a surviving spouse under the EPIC. We are not definitely and firmly convinced that the trial court erred

when it made findings supporting its determination, and we conclude that the trial court's decision not to apply the equitable doctrine of contribution was within the principled range of outcomes.

IV. REMOVAL OF PERSONAL REPRESENTATIVE

A. STANDARD OF REVIEW

We review the trial court's decision to remove a personal representative for an abuse of discretion. *In re Kramek Estate*, 268 Mich App 565, 575; 710 NW2d 753 (2005). The trial court abuses its discretion when its outcome falls outside the principled range of outcomes. *In re Temple Estate*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

B. STANDING

King contends that the trial court erred by removing King as personal representative of James's estate because Maggie did not have standing to petition to remove her. We disagree.

An interested person may petition to remove a personal representative for cause at any time. MCL 700.3611(1). An interested person includes a spouse. MCL 700.1105(c).[3] Because Maggie was James's spouse, she had standing to petition to remove King as personal representative of James's estate.

C. REMOVAL

King also contends that the trial court erred by removing King as personal representative because the trial court had no basis for removal. We disagree.

The trial court may remove a personal representative for a variety of circumstances:

> (2) The court may remove a personal representative under *any* of the following circumstances:
>
> (a) Removal is in the best interests of the estate.
>
> (b) It is shown that the personal representative or the person who sought the personal representative's appointment intentionally misrepresented material facts in a proceeding leading to the appointment.
>
> (c) The personal representative did any of the following:

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[3] This section uses the general term "spouse," not the specific term "surviving spouse." We presume that the omission of language that is included in another part of the same statute is intentional. *Ernsting v Ave Maria College*, 274 Mich App 506, 513; 736 NW2d 574 (2007). Whether Maggie was entitled to inherit as a surviving spouse was irrelevant to whether she had standing to petition for King's removal as personal representative.

(*i*) Disregarded a court order.

(*ii*) Became incapable of discharging the duties of the office.

(*iii*) Mismanaged the estate.

(*iv*) Failed to perform a duty pertaining to the office. [MCL 700.3611 (emphasis added).]

A dispute or disagreement alone is not a sufficient basis to remove a personal representative. *Kramek*, 268 Mich App at 576. However, disagreement may rise to the level of implicating the best interests of the estate when it complicates the dispute or causes the estate to be unduly burdened. See *id.* at 577.

In this case, the record is replete with familial conflict. While disagreement alone is no basis to remove a personal representative, the conflict extended to the personal representative's performance of statutory duties when King refused to provide an accounting at Erwin Oakes's request.[4] We conclude that the trial court's decision to remove King as personal representative and replacing King with a neutral third party was an outcome within the principled range of outcomes.

V. VENUE AND DISQUALIFICATION

As an initial matter, we note that King's issues regarding venue and disqualification are not properly before this Court. This Court has jurisdiction to hear appeals as of right from final orders or orders in which an appeal of right is provided for by statute or court rule. MCR 7.203(A). The orders in this case are not final orders, and our court rules do not provide for appeals of right from either decisions regarding venue or disqualification. See MCR 5.801(B). King is not entitled to an appeal of right on these issues. However, in the interests of judicial economy, we exercise our discretion to treat King's appeal as an application for leave to appeal, grant leave, and address the issues presented. See, e.g., *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

First, King contends that the trial court improperly refused to change venue. We disagree.

We review for an abuse of discretion the trial court's resolution of questions of venue. *Shock Bros, Inc v Mobark Indus, Inc*, 411 Mich 696, 698; 311 NW2d 722 (1981). Among other reasons, the trial court may order venue changed in an estate proceeding for the convenience of the parties, witnesses, and attorneys. MCL 700.3201; MCR 5.128. In this case, King moved to change venue more than 18 months after commencement of the action and after King consented regarding holding hearings in Tuscola County. We conclude that the trial court's decision to deny King's motion did not fall outside the range of principled outcomes.

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[4] See MCL 700.3703(4) and MCL 700.3706.

Second, King contends that the trial court improperly refused to disqualify itself on the basis of judicial bias. Again, we disagree.

We review for an abuse of discretion the trial court's factual findings supporting its decision on disqualification and review de novo its application of the facts to the law. *Cain v Dep't of Corrections*, 451 Mich 470, 494-495; 548 NW2d 210 (1996). "Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). A judge must be disqualified when he or she cannot hear a case impartially, including when the judge is personally biased or prejudiced against a party. *Cain*, 451 Mich at 494-495. The party who alleges that a judge is biased must overcome the heavy presumption in favor of judicial impartiality. *Id.* at 497. Judicial rulings almost never constitute a valid basis for bias, unless the judicial opinion displays "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 503 (quotation marks and citation omitted).

In this case, even presuming that the trial court on one occasion allowed Maggie's counsel to participate over the phone at a hearing after failing to extend the same courtesy to King's counsel on another occasion, this single action did not display the type of deep-seated favoritism that would demonstrate judicial bias, particularly when the trial court did not extend the courtesy to Erwin Oakes's counsel, who had supported Maggie's motions in the controversy, on other occasions. And the trial court's rulings against King had sound legal bases and did not demonstrate bias. We conclude that the trial court did not abuse its discretion by denying King's motion for disqualification.

We affirm. The prevailing parties may tax costs. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Christopher M. Murray